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IN THE

Supreme Court of the United States

October Term, 1955

No. 642

STUDENTS BOOK COMPANY, *Petitioner,*

vs.

WASHINGTON LAW BOOK COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATHAN L. SILBERBERG
1001 Pennsylvania Bldg.
Washington 4, D.C.
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on December 1, 1955. (R. 221).

OPINION BELOW

The United States District Court for the District of Columbia did not render an opinion in this case. The opinion of the United States Court of Appeals for the District of Columbia is set forth in the Appendix hereof.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254, as amended. Jurisdiction of the trial court was based on 15 U.S.C. 13, 15.

QUESTIONS PRESENTED

Whether consignment or sale-or-return transactions are exempt from the Robinson-Patman Act; what constitutes a valid consignment entitled to such exemption; whether discrimination as to terms, alone, renders a seller liable; whether a jury should be told that the seller has been adjudicated in violation of the Anti-Trust Laws by another court; whether a trial court should charge a jury as to the District's Sales Tax Act after testimony as to the relationship of sellers and resellers thereunder, and whether a trial court's judgment may be affirmed without opinion, where the only Court of Appeals opinion calls for a new trial.

STATUTES INVOLVED

The pertinent statutes are discussed in the argument. They are set forth in full in the opinion and in the joint appendix below.

STATEMENT

Petitioner, a District corporation, sold books and supplies to students, particularly at nearby George Washington and American Universities, and at Howard University. (R. 60-2). Respondent was the District outlet for its parent, West Publishing Co., (R. 10). Almost 90% of the books used by local law students were handled by Respondent. (R. 48, 91).

To "perfect our service to the bench and Bar," Respondent in 1947 terminated a consignment arrangement with Petitioner and sold books to Respondent at 6% below the retail price, with no right to return unsold books. (R. 86, 120).

In 1949 American's book store began obtaining the books from Respondent at 20% below list price, with the full right to return all unsold books. (R. 63). In 1951 the same privilege was accorded by Respondent to George Washington's store. (R. 17). Petitioner's protests to Respondent were unvailing. (R. 63, 65).

Howard's store bought from Respondent at 6% below list price until 1951 when its discount was increased to 20%. Howard always had the right to return unsold books. (R. 19, 50).

Under the District's Sales Tax Act, Petitioner and all three college stores had filed with Respondent identical reseller's certificates. Each store collected the tax from the students but Respondent neither collected nor remitted any such tax. (R. 13, 66-7, 139-40).

Price lists furnished by Respondent to Howard showed retail price and the cost to the retailer—20% less. (R. 52-3). Respondent's invoices to George Washington and its reports to Respondent showed all items at 20% below list. (R. 37-8).

Respondent's president denied knowledge of the price lists (R. 21-2) and of the "Consignment Sales Reports" filed by George Washington. (R. 159-60). He contended that the transactions with the college stores were all consignments, not sales, (R. 14) and that Respondent was strictly a retailer. (R. 24).

Said president testified he had changed Petitioner's terms because Petitioner was $10,000 delinquent in its account, although Respondent's records showed Petitioner had paid its account in full at that very time. (R. 152-3, 159-62). The fact that Respondent had changed its policy toward Petitioner immediately after Respondent was adjudicated in violation of the Anti-Trust Laws was kept from the jury. (R. 7-8, 38-40).

REASONS FOR GRANTING THE WRIT

1. Confusion Will Result From Silent Affirmance, Vocal Dissent

We have a situation almost unique in appellate proceedings: The only opinion is that of the judge who felt the trial court committed substantial error and that a new trial should be granted. (App. 6a). His colleagues, who comprised the 2-1 majority for affirmance, said nothing.

Thus, on questions of vital importance and of first impression in interpreting acts of Congress, we are left with a well-reasoned opinion, but one which must be studied closely to realize that it does not represent the voice of the court.

Certainly this is not the accepted and usual course of judicial proceedings. The departure is so extreme as to justify this Court in exercising its supervisory power.

2. Basic Questions Require Interpretation by This Court

Since the Robinson-Patman Act amended the Anti-Trust Laws 20 years ago, there has been little interpretation of the prohibition against discrimination in price or terms.

This Court recently stated, in *Moore* vs. *Mead's Fine Bread,* 348 U.S. 115, that Robinson-Patman's prohibition of price discrimination is to be interpreted broadly. This Court previously had struck down the use of consignment subterfuges to circumvent earlier phases of the Anti-Trust Laws. (*Standard Patterns* vs. *Magrane-Houston,* 258 U.S. 346).

If the present decision remains undisturbed, however, Robinson-Patman can be ignored so long as the seller merely rubber-stamps "Consignment" on his invoices, as Respondent did.

There is an equal need for judicial interpretation of Subsection (e) of Robinson-Patman, which prohibits discrimination as to "any service or facilities." In the instant case, it was undisputed that Howard, even while paying the same prices as Petitioner, was permitted to return all unsold books to Respondent for full credit. Petitioner was denied that right, so that, as the opinion points out, Petitioner's gross profits from the sales of 16 books was wiped out by its being stuck with just one such book. (App. 10a).

The Federal Trade Commission, charged with enforcement of Robinson-Patman for the public good, decided in *In re Appleton-Century-Crofts, Inc.,* 1951, 47 FTC 1371, that denial of such privilege of returns violated the act.

Appleton, a publisher of educational texts, accepted for full credit the return of up to one-third of the copies of any book purchased from them, if returned within 60 days of the opening of a semester. But this return privilege was denied to its customers who also dealt in secondhand books.

The Commission ordered Appleton to cease and desist from "furnishing of the service or facility of accepting the return for credit of unsold copies of such books, to any purchaser of such books, when such service or facility is not accorded on proportionally equal terms to other purchasers of such books, . . ." No judicial review of this decision has been found.

3. Conflict Between Sales Tax Act and Robinson-Patman Should be Resolved

In 1949 Congress enacted a Sales Tax Act for the District of Columbia. Under its provisions, Respondent obtained from each college store and from Petitioner a re-seller's exemption certificate.

On this basis, Respondent (which described itself as merely a retailer, not a distributor) collected and remitted no sales tax on books sent to the college stores or to Petitioner.

As the opinion makes clear, the significance of the Sales Tax Act should have been explained to the jury, to help them solve the puzzling question of consignment vs. sales. But the trial court refused to charge the jury thereon. (App. 5a, 9a).

If Congress, in passing the Sales Tax Act 13 years after Robinson-Patman, did not intend the designations of the one to apply to the other, Congress did not say so and it is, therefore, for this Court to clarify.

4. Respondent's Anti-Trust Violations Improperly Kept From Jury

The trial court's attention was directed to the fact that Respondent and its parent, West Publishing, had been found in violation of the Anti-Trust Laws in

Callaghan vs. *FTC, II,* 163 F. 2d 359. The trial court refused to permit the jury to hear of this. (R. 7-8).

Even if this decision did not violate 15 U.S.C. 16, the question was raised anew when Respondent's president testified as to his reasons for changing its sales policy toward Petitioner. When Petitioner sought to cross-examine him as to the connection between this change of policy and the anti-trust decision of *two weeks earlier,* objection thereto was sustained. (R. 38).

Respondent went into the matter further by showing a change of policy toward one of its *Callaghan* co-respondents. When Petitioner sought to cross-examine into that phase of the anti-trust violation, the trial court again sustained objection, adding a threat of mistrial. (R. 40-1).

It was Respondent, not Petitioner, which had gone back into this 1947 change of sales policy. Thus the trial court immunized Respondent against any questioning of its policy flowing from the anti-trust violation. This was directly contrary to the spirit, if not the letter, of 15 U.S.C. 16.

The Court of Appeals did not deal with this issue.

CONCLUSION

It is respectfully submitted that because of the importance of the questions and the manner in which they have been left unresolved, this petition for a writ of certiorari should be granted.

NATHAN L. SILBERBERG
1001 Pennsylvania Bldg.
Washington 4, D. C.
Attorney for Petitioner.

January 25, 1956

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12563

STUDENTS BOOK COMPANY, APPELLANT

v.

WASHINGTON LAW BOOK COMPANY, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided December 1, 1955

Mr. Nathan L. Silberberg for appellant.

Mr. William E. Leahy, with whom *Messrs. William J. Hughes, Jr.,* and *Ben Ivan Melnicoff* were on the brief, for appellee.

Before EDGERTON, Chief Judge and BAZELON and FAHY, Circuit Judges.

BAZELON, *Circuit Judge:* Appellant sued for treble damages for injuries allegedly caused by appellee's sales of student law books to appellant's competitors at preferential prices and under preferential terms in violation of the Robinson-Patman Act.[1]

Appellant operates a retail store supplying law books and other supplies to law students. Appellee, majority owned by the West Publishing Company of Saint Paul, Minnesota, is the exclusive distributor in Washington,

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[1] 38 STAT. 730 (1914), as amended, 49 STAT. 1526-27 (1936), 15 U.S.C. §§ 13(a) and 13(e) (1952).

D. C., of West and some other publications. It is the source of between 80 and 90 per cent of the books used by law students in the Washington area. Before the fall of 1947, it supplied books to appellant at a discount of 20 per cent off list price and allowed appellant to return all unsold books for full credit. This is the usual and customary basis for distribution of student law books and other books in the educational field.

In 1947, appellee-seller informed appellant-buyer that, beginning with the fall semester, the discount would be cut to 6 per cent and returns would no longer be permitted. However, the appellee-seller thereafter allowed more favorable terms to the campus book stores of various Washington law schools.[2] This is the discrimination of which appellant complains.

The Robinson-Patman Act makes it unlawful to discriminate between "purchasers of commodities . . . for . . . resale" as to price[3] or as to services or facili-

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[2] Up to September 1951, the Howard University book store was permitted to return unsold books although its discount, like appellant's, was only 6 per cent. After September 1951, its discount was raised to 20 per cent. The George Washington University book store began carrying law books in September 1951 and has since enjoyed a 20 per cent discount and a right of return. The Washington College of Law became part of American University in the fall of 1949 and since then the American University book store has carried appellee's books at a 20 per cent discount with the right of return.

[3] 15 U.S.C. § 13(a) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly

ties.[4] Appellee's defense was that the statute is inapplicable because, while appellant was a *purchaser* of its books, the campus book stores were only *agents* selling books for appellee and receiving a commission therefor.[5]

With respect to one of the allegedly competitive book stores, that at Howard University, appellee's president admitted that its deliveries of books were sales up to September 1951, but asserted that subsequent transactions were consignments. The manager of the Howard store testified, however, that the only change that occurred in September 1951 was a change in the discount from 6 to 20 per cent. Orders were placed in the same manner, billing and invoicing were unchanged, the method of payment was the same, unsold books were returned for

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in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

[4] 15 U.S.C. § 13(e) provides:

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[5] Appellee also argues that, even if its transactions with the campus book stores were sales, they were exempted from the application of the Robinson-Patman Act by virtue of 52 STAT. 466, 15 U.S.C. § 13c (1952), which provides:

"Nothing in sections 13-13b . . . of this title shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Although the appellee has sold books to all three of the universities for their own use, *i.e.*, for their libraries, the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and the books sold were not for the use of the universities, but for resale at a profit. The exemption provision is therefore inapplicable to these transactions.

credit against future purchases, just as before. So far as he was aware, he had never been a consignment agent for appellee.

A second alleged competitor, the George Washington University book store, rendered periodic "consignment sales" reports to appellee for books received. But the assistant comptroller of the University testified that, as to the 20 per cent which the store made on each book sold, he did not know "whether you would call that handling them on commission or not." At an earlier trial, he testified, "I wouldn't call it a commission."[6]

Thus there was a conflict in the evidence from which the jury could have found that the transactions with the campus book stores were either consignments or sales. To enable the jury to resolve this conflict, the court charged, in essence, that if title to the books passed to the campus book stores, they were purchasers, but that if title did not pass to them, they were merely consignment agents.[7]

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[6] No testimony was received from the third campus store involved, American University.

[7] In pertinent part, the charge was:

"The defendant claims, however, that while it did consign to certain parties, as its agents, law books on different terms from which it offered to sell to the plaintiff, that the relationship between the defendant and those dealers, other than the plaintiff, was that of principal and agent; that the property was not sold to these dealers, but merely consigned to them for sale.

"Now what is a sale and what is a consignment? A sale of goods is an agreement whereby the seller transfers the property in goods or the owner of the goods to the buyer for a consideration called the price.

"Were these books sold to these other dealers, that is, the college book stores, or were they merely transferred to them for sale, or consigned, as the term has been used in this case? That is the question for you to determine, taking into consideration all the evidence in the case.

"The defendant claims that these books were consigned to these other dealers, the college book stores, and not sold to them; that there was a discount allowed to them for their

Since the jury's verdict sustained the defense, it must have found that the transactions were consignments.

The primary question on this appeal is whether the trial court erred in denying appellant's request for two instructions. The first relates to certificates which the campus book stores executed under the District of Columbia Sales Tax Law to exempt appellee from collecting and paying sales taxes, and in which they represented that they were purchasers for resale from appellee:

"Plaintiff's Request No. 3

"Under the District of Columbia Sales Tax Law, the definition of 'retail sale' laid down by Congress specifically excludes any sales to one who re-sells those goods. That law also provides that a re-seller's exemption certificate must be obtained by the vendor or the vendor is liable for the sales tax. (47 D.C. Code 2601 (14a), 2607) These definitions under our Sales Tax Law may be considered by you in deciding whether Defendant was merely a retailer of these student books or a distributor to the stores which actually made the sales to the students."

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sale, some 20 per cent and a privilege of returning those which were not sold.

"The fact that there was this privilege of returning is not conclusive one way or the other on whether it was a sale or not. It might be consistent with a consignment.

"It is for you and you only to decide this question of fact, taking all the facts into consideration. Did the defendant sell law books to these other dealers at a price different from that which he was willing to sell to the plaintiff, or were these books merely consigned to these other dealers as agents to sell?

"Now consignment does not imply a sale, bu. imports an agency, and the title or ownership remains in the seller. Where in the case of a sale the title passes to the buyer.

"Take all this into consideration and determine whether or not the title to these law books remained, title and ownership, remained in the defendant when they were sent to these other dealers—When I say 'other dealers' I mean the college book stores, of course—or whether the title passed to these dealers and they became the owners with the privilege of returning those which were not sold."

The second relates to the distinction between consignment and sale:

"Plaintiff's Request No. 5

"There has been testimony by Defendant that it did not sell books to some of the college stores, but merely consigned them. Now it is for you to determine whether, in truth, those were sales or consignments. There were no contracts between those parties so you must judge from the manner in which the arrangement operated. 'The term "consign" ... may express the true state of the case ... or it may be a mere subterfuge, and if it be the latter, there is no magic in that word which can take from the transaction its real character,' (1 Mechem on Sales 43; Butterick vs. F.T.C., 1925, CCA II, 4 F 2d 910; Standard Patterns vs. Magrane-Huston, 1922, 258 U.S. 346; in re Wells, D.C. Penn. 140 F. 752)."

My colleagues are of the view that the first quoted request is too involved and obscure for its rejection to furnish ground for reversal, especially as it was not necessary for the court to pinpoint this aspect of the evidence in charging the jury. As to the second quoted request, they are of the view that the charge given by the court told the jury, in effect, that they were to decide whether the transactions were sales or consignments upon the whole evidence, without giving undue weight to the fact that the parties to the transactions sometimes used the word "consign." Accordingly, they find no error affecting substantial rights. The judgment below must therefore be affirmed.

I think, however, that denial of the requested instructions is error requiring a new trial. I state my reasons.

The trial court's instruction on the difference between a "consignment" and a "sale" was correct as far as it went, but in light of the evidence there was a plain need for elaboration.

The evidence in this record justified an instruction that the jury's choice was not restricted to that between *unconditional* sale and mere agency but that it might find the transactions between appellee and the campus book stores were *conditional* sales or "sale or return" arrangements in which "title passes to the purchaser subject to his option to return the property within a specified or a reasonable time."[8] The jury needed to be told not only that sale depends upon passage of title but also what the indicia of title are, *e.g.*, the exercise of dominion over the goods.[9] It is not always easy, even for a court, to decide whether a transaction is a sale or an agency.[10] Where

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[8] Sturm v. Boker, 150 U.S. 312, 329 (1893). Cf. D. C. CODE §§ 28-1101, 28-1203, Rule 3(1) (1951).
Appellee's president testified:

> "Q. You told about the returns. When could they return books to you, American University, that is, the book store? A. Mr. Silberberg, I am not too familiar with that phase of our business. I suppose in many times it was reasonable. I don't think there was any hard and fast rule in our dealings with the law schools because sometimes if there is delay we make exceptions and allow books to be returned, particularly oftentimes there is a new edition published and we have to take up the older edition. Sometimes there is a little delay in a transaction of that sort."

[9] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 354 (1922).
Appellee's president testified, as to the books delivered to the campus book stores:

> ". . . we get paid as they sell the books . . . They had a large supply of books on hand left over. Those books they had on hand they could sell them and account for them or they could return them or do what they pleased with them. We never get paid until they make their sales to the students and then they make an accounting and pay us."

[10] Dryden v. Michigan State Industries, 66 F.2d 950, 953 (8th Cir. 1933), quoting Marrinan Medical Supply v. Fort Dodge Serum Co., 47 F.2d 456, 460 (8th Cir. 1931):

> ". . . in recent times, the real or supposed needs and exigencies of business and the ingenuity of business men and of their lawyers have evolved a class of contracts which have

that question is entrusted to a jury, the charge should contain substantially the criteria which the court would invoke in resolving the question without a jury. The instant charge, in defining a sale, uses the language of subparagraph (2) of the first section of the Uniform Sales Act,[11] but does not refer to the provision in subparagraph (3) that "a sale may be absolute or conditional."[12] The only recognition of this provision in the charge is this statement:

> "The fact that there was this privilege of returning is not conclusive one way or the other on whether it was a sale or not. It might be consistent with a consignment."

Though the *jury* was told that the privilege of returning goods might be consistent with a consignment, *was not told that there is a well-recognized class of sales in which title vests in the buyer upon delivery subject to divestment upon return of the goods,*[13] or that, in this type of case, the locus of title is tested "not so much from the standpoint of the sender (bailor or seller) as from that of the receiver (bailee or buyer)."[14]

The instructions requested by the plaintiff and denied by the trial court do not, of course, articulate all the foregoing criteria applicable to the jury's consideration of the evidence. But they do supply some of the much needed elaboration which I have described.

> the earmarks of both sale contracts and factorage contracts. It is not always easy to determine into which class a particular contract falls."

[11] D. C. Code § 28-1101(2) (1951): "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the 'price.'"

[12] *Id.*, § 28-1101(3).

[13] *Id.*, § 28-1203, Rule 3(1).

[14] Dryden v. Michigan State Industries, 66 F.2d 950, 953 (8th Cir. 1933).

Under the instruction relating to "consignment" versus "sales" which the trial court denied, the jury would have been advised that the recurring use of the word "consignment" in the documents did not preclude a finding that the transactions were, in fact, sales.[15] The jury would also have been advised that, since use of the word "consignment" in the documents is not controlling, it should consider "the manner in which the arrangement operated," *i.e.*, "the acts and circumstances of the parties, especially ... the construction which they themselves put upon the contract in executing it."[16] Pertinent in this connection is the denial of the instruction which reflected the fact that the various campus book stores had represented themselves to be *resellers* of appellee's books under the District of Columbia Sales Tax Law[17] by filing exemption certificates with the appellee. Upon the state of this record, I think both of the denied instructions would have provided information essential to the jury's consideration.

Appellee argues that, even if the charge is inadequate, the judgment must be affirmed since appellant failed to prove any damages. This argument springs from the fact that the discriminatory treatment, in large part, began at the same time that the campus book stores began to compete with the appellant. This, it is said, demonstrates that appellant's loss of business resulted from the competition rather than the discrimination. It is undeniable, and appellant admits that, with the opening of a campus store, some students, formerly buying from appellant, found it more convenient to buy from the campus

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[15] Ferry & Co. v. Hall, 188 Ala. 178, 66 So. 104, L.R.A. 1917B 620 (1914); see also Samson Tire & Rubber Co. v. Eggleston, 45 F.2d 502, 504 (5th Cir. 1930).

[16] Samson Tire & Rubber Co. v. Eggleston, *supra;* see also McCallum v. Bray-Robinson Clothing Co., 24 F.2d 35, 36 (6th Cir. 1928).

[17] D. C. Code § 47-2601, 14(a), as amended (Supp. 1954); D. C. Code § 47-2607 (1951).

store, especially since both sold at the same prices. Nevertheless, there is some evidence in the record that other students continued to buy their supplies from the appellant even after competition from the campus stores began and that their patronage was not lost until appellant ceased to stock appellee's law books. And there is ample evidence that it was the discrimination that prevented appellant from stocking appellee's books.[18] Thus, it cannot be said that there is no evidence in the record from which a jury could find that appellant was damaged by the discrimination.

There is, of course, no accurate way of determining the amount of appellant's loss due to competition as against the amount due to discrimination. But the "rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."[19]

The problem is not a new one. In damage suits brought under the antitrust laws, the Supreme Court has held that the nature of the subject matter is such that the jury must be allowed to base its determination of damages upon "probable and inferential" proof.[20]

Affirmed.

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[18] The record shows that student law books are often replaced in school curricula so that a dealer, unless he has a right to return unsold copies for credit, stocks them at his peril. Indeed, the evidence shows that appellant would lose his profit on sixteen books for every book remaining unsold. His competitors enjoy not only the right to return, but also a 20 per cent profit margin, as compared to his 6 per cent margin.

[19] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931).

[20] Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946); see also Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., *supra*.

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STUDENTS BOOK COMPANY, *Petitioner*,

v.

WASHINGTON LAW BOOK COMPANY, *Respondent*.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM E. LEAHY
WM. J. HUGHES, JR.
BEN IVAN MELNICOFF
Bowen Building,
Washington 5, D. C.
Counsel for Respondent.

WILSON - EPES PRINTING CO. - NE 7-6002 - WASHINGTON 1, D. C.

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BRIEF IN OPPOSITION

Questions Presented

Of the medley of questions presented by Petitioner only two appear to merit consideration: (1) whether certain instructions of the trial judge were erroneous; (2) whether a dissenting judge can validly write the 2 to 1 opinion of the Appellate Court.

Counter-Statement of the Case

Petitioner sued for treble damages under the Robinson-Patman Act, 15 U.S.C. Sec. 13(a) alleging a 20% discount to competitors as against a 6% discount to Petitioner. The proof showed that in 1947 the Defendant, a retailer of law books, decided in addition to selling over-the-counter, to concentrate on a consignment method of doing business by selling student law books through campus

book stores which acted as consignment agents.[1] All purchasers, whether making their purchases at the retail store on 13th Street, or through one of the consignment agents, paid the list price. No price advantage was realized by anyone. The campus stores received a commission of 20% of the list price for handling and merchandizing the books. (J.A. 131) Invoices to the campus stores were clearly stamped "Consignment," and the consignment agents rendered periodic reports to Washington Law Book Company, the consignor, on forms printed for that purpose by the Washington Law Book Company. (e. g. J. A. 198-214, Defendant's Exhibits Nos. 7A and 7B). Periodically respondent took back the unsold books.

The present suit is based on Petitioner's claim that the foregoing constitutes a violation of 15 U.S.C. 13(a). Respondent showed its deliveries of books to be consignments and not sales and that petitioner's loss of trade principally stemmed from George Washington University's action in opening its own convenient book store in 1951 in University owned facilities and staffed by University personnel, and selling books on its own campus, as did all other campus-consignees, at the same prices charged by petitioner. There was neither claim nor proof that the consignment agents, the campus book stores, ever

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[1] Petitioner, in its Statement, p. 3, intimates that Petitioner alone was terminated as a consignment agent in 1947. This is incorrect. All previous consignment arrangements with all persons, except campus book stores, were terminated. (J.A. 32,34). Thus, there was no discrimination against Petitioner.

Petitioner is likewise incorrect in its recital, at p. 3 of its Statement, that "In 1949, American's book store began obtaining the books from Respondent at 20% below list price, with the full right of return of all unsold books." Petitioner fails to state that Washington College of Law, upon becoming a part of American University in 1949, became eligible to participate in the consignment arrangement which had been in existence between American University and Washington Law Book Company "for a long time prior to 1949." (J. A. 14)

sold at prices below petitioner's nor that these agents sold to the public or to anyone but their own students. Hence, there was no proof of loss of sales by petitioner and no proof of damage traceable to the alleged discriminatory practices.

ARGUMENT

A. The General Verdict Is Decisive That the Transactions Were Consignments:

Petitioner appears to argue that consignment transactions are sales to purchasers for resale under 15 *U.S.C.* Sec. 13(a). On principle it seems obvious that when A makes B his agent and delivers goods to him on consignment B is not the "purchaser" of these goods for "resale". Hence, by its very terms, the Act is inapplicable. Petitioner's vague language as to whether there was a "valid" consignment (Pet. p. 2) and as to whether "Robinson-Patman can be ignored so long as the seller merely rubber-stamps "Consignment" on his invoices (Pet. p. 5) merely means that he contends there was no real consignment, in truth and in fact. This question was clearly submitted to the jury by careful instructions (Op. below p. 4 footnote 7). The jury found against Petitioner and as its verdict was a general one it must be assumed to have decided, upon proper evidence,[2] that the transactions were in fact consignments and not cloaks for purchases as to which there was no evidence.

B. The Instructions Were Properly Denied:

The only questions legitimately open for review are whether the Court erred in denying two instructions re-

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[2] As Petitioner did not move for a directed verdict he cannot complain of the weight of the evidence or that the verdict is not supported by the evidence (See *Zimmerman* v. *Emmons*, 225 F. (2) 97,99, cert. den. and cases collected in footnote 10.)

quested by Petitioner. The majority of the Court below was of the opinion that the first instruction (Pl. Req. No. 3, Op. below p. 6) as to how the consignment agents treated their sales under the District of Columbia Sales Tax law was too involved and obscure. The dissenting Judge felt that the way in which the consignment agents regarded the transactions as evidenced by their obtaining under the D. C. Sales Tax Law resellers exemption certificates covering sales of books for Respondent might throw some light on the question of whether the transactions were consignments or sales (Op. Below, p. 10). However, there was no evidence that Respondent was advised of their consignment agent's acts in filing the District of Columbia Sales Tax returns and referring to themselves therein as "resellers" nor as to why they did so, which was, no doubt, to avoid tax.[3] In any event the campus bookstores' opinion of the meaning of a word of art used in a tax statute is clearly of no probative value insofar as third parties are concerned.

Two members of the Court below felt that the second requested instruction was unnecessary, having already been covered by the general charge. (Op. below p. 7) The dissenting Judge below disagreed.

The second requested instruction read as follows:

"Plaintiff's Request No. 5.

"There has been testimony by Defendant that it did not sell books to some of the college stores, but merely consigned them. Now it is for you to determine whether in truth, those were sales or consignments. There were no contracts between those parties so you must judge from the manner in which the arrangement operated. 'The term "consign" . . . may express the true state of the case . . . or it may

[3] The undenied testimony of George Washington was that it paid the Sales Tax as the agent of Respondent.

be a mere subterfuge, and if it be the latter, there is no magic in that word which can take from the transaction its real character.' (1 Mechem on Sales 43; Butterick v. F.T.C., 1925, CCA II ,4 F. 2d 910; Standard Patterns v. Magrane-Huston, 1922, 258 U.S. 346; in re Wells, D. C. Penn. 140 F. 752." (Op. below p. 6)

The majority below felt that the Court's general instructions recited in footnote 7, pp. 4 and 5 of the Opinion below, adequately told the jury that:

> "they were to decide whether the transactions were sales or consignments upon the whole evidence, without giving undue weight to the fact that the parties to the transactions sometimes used the word "consign." (Op. below p. 7)

The dissenting Judge, however, felt that the above instruction should have been given. He stated the evidence likewise was susceptible of the view that the consignment transactions were in fact conditional sales or "sale or return" arrangements in which "title passes to the purchaser subject to his option to return the property within a specified or a reasonable time." (Op. below, p. 7)

It is sufficient, we think, to point out that no such instruction was ever reque ted by petitioner;[1] certainly the theory of a conditional sale or "sale or return arrangements" is not revealed by Plaintiff's Request #5 above quoted. The case was not tried on any theory of conditional sale or sale-or-return arrangements tho the trial court instructed the jury as to the return privilege and

[1] The dissenting Judge states:

> "The instructions requested by the plaintiff and denied by the trial court do not, of course, articulate all the foregoing criteria applicable to the jury's consideration of the evidence. But they do supply some of the much needed elaboration which I have described. (Op. Below p. 9)

that it was not conclusive one way or the other (Op. below p. 5, footnote). The requested instruction adds nothing to what the Court charged. (Op. below, p. 4-5 footnote 7.)

C. The Form of the Opinion Below Presents No Error:

Petitioner asks review based on the form of the Opinion below. Petitioner states:

> "We have a situation almost unique in appellate proceedings: The only opinion is that of the judge who felt the trial court committed substantial error and that a new trial should be granted. (App. 6a) His colleagues, who comprised the 2-1 majority for affirmance, said nothing." (P. 4, Petition)

We submit the case is simply that of a 2 to 1 affirmance. This is proved by the judgment below which states:

> **"JUDGMENT**
>
> This cause came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.
>
> On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed. Dated December 1, 1955.
>
> Per Curiam
>
> Circuit Judge Bazelon is of the view that a new trial should be awarded for the reasons stated in the opinion in this case."

There is nothing to require an appellate court to write an opinion and there is nothing which prevents an appellate court voicing its 2 to 1 opinion through a dissenting judge. This court did so in *Helvering* v. *Davis* 301 U. S. 619, 639 and in *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562. In the latter case, the late Justice Jackson wrote the

opinion of this court but then filed a separate opinion of his own which he referred to as a dissent. (Op. p. 575). He stated:

> "It cannot be suggested that in cases where the author is the mere instrument of the Court he must forego expression of his own convictions. Mr. Justice Cardozo taught us how Justices may write for the Court and still reserve their own positions, though overruled. *Helvering* v. *Davis,* 301 U. S. 619, 639."

A recent precedent (in part) in the United States Court of Appeals for the District of Columbia is *Eastern Air Lines* v. *Union Trust Co.* 221 F. (2d) 62, 80, reversed on other grounds, 100 L. Ed. 125. As courts review judgments, not opinions, there is no substance to the present claim of error.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

WILLIAM E. LEAHY
WM. J. HUGHES, JR.
BEN IVAN MELNICOFF
Bowen Building,
Washington 5, D. C.
Counsel for Respondent.